No. 988

No. 1207

No. 15073

Office - Supreme Court, U.S.
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United States
Court of Appeals
for the Ninth Circuit

DESSER, RAU & HOFFMAN, and JACK L. RAU, individually, Appellants,

vs.

GEORGE T. GOGGIN, Trustee in Bankruptcy of Stockholders Publishing Company, Inc., a bankrupt, Appellee.

Transcript of Record

Appeal from the United States District Court
for the Southern District of California
Central Division

FILED
JUN -7 1956
PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. —5-24-56

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Adoption of Appellants' Statement of Points and Designation (USCA) 33

Affidavit of David R. Nisall 24

Appeal:

Adoption of Appellants' Statement of Points and Designation of Record on (USCA) 33

Certificate of Clerk to Transcript of Record on 30

Notice of 21

Order Extending Time to Docket 25

Statement of Points on (DC) 26

Stipulation as to Record on (DC) 28

Undertaking for Costs on 22

Certificate of Clerk to Transcript of Record 30

Findings of Fact, Conclusions of Law and Order 9

Memorandum by Referee 6

Names and Addresses of Attorneys 1

Notice of Appeal 21

Order Affirming Order of Referee..... 19

Order Extending Time to Docket Appeal..... 25

Order to Show Cause..... 5

Petition for Review..... 13

Petition to Allow Payment of Expenses..... 3

Statement of Points on Appeal (DC)..... 26

Adoption of (USCA)..... 33

Stipulation as to Record on Appeal..... 28

Undertaking for Costs on Appeal..... 22

NAMES AND ADDRESSES OF ATTORNEYS

Attorneys for Appellant:

DESSER & HOFFMAN
DAVID R. NISALL
JACK L. RAU

444 North Camden Drive
Beverly Hills, California

Attorneys for Appellee:

ROBERT H. SHUTAN

433 S. Beverly Drive
Beverly Hills, California

CRAIG, WELLER & LAUGHARN

111 West 7th Street
Los Angeles 14, California. [1*]

In the District Court of the United States, Southern District of California, Central Division

No. 64381—WB

In the Matter of STOCKHOLDERS PUBLISHING COMPANY, INC, a corporation, alleged bankrupt.

PETITION TO ALLOW PAYMENT OF EXPENSES

To the Honorable David B. Head, Referee in Bankruptcy:

The petition of Desser, Rau & Hoffman respectfully represents:

I.

That prior to the filing of the involuntary petition in bankruptcy herein, your petitioners acted as attorneys for Stockholders Publishing Company, Inc., a corporation, the above named alleged bankrupt. That during the period of December 20, 1954 to December 31, 1954, your petitioners acting as attorneys for said alleged bankrupt opened a bank account, designated as "Jack L. Rau, Special Account" at Union Bank & Trust Co., in which was deposited certain funds belonging to said corporation, and out of which certain disbursements were made. That an accounting of said receipts and disbursements was forwarded to George T. Goggin, Esq., Receiver herein, on January 5, 1955, at which time the said account contained the sum of $16,-163.15. [2]

II.

In connection with your petitioners' representation of said alleged bankrupt since December 26, 1953, your petitioners have expended substantial sums of money for transportation to the East coast in connection with the affairs of the corporation, long distance telephone charges, traveling and hotel expenses. That said expenses amounted to $3217.68 as per Exhibit "A" attached hereto and made a part hereof.

III.

That your petitioners have remitted to the said Receiver the sum of $12,945.47 and have retained the sum of $3217.68 pending a determination by this Court as to whether or not your petitioners may offset said sums deposited with them by the alleged bankrupt with their out of pocket expenses.

IV.

That during the time your petitioners represented the alleged bankrupt, your petitioners never billed the corporation for fees, nor received any monies on account of fees from the corporation. That the said sum of $3217.68 retained by your petitioners represents no charge for fees.

Wherefore, your petitioners pray that an order be made and entered herein authorizing your petitioners to reimburse themselves from the "Jack L. Rau, Special Account" in the sum of $3217.68 for transportation, long distance telephone charges,

hotels, travel, etc. as hereinabove set forth. [3]

DESSER, RAU & HOFFMAN
/s/ By JACK L. RAU

EXHIBIT "A"

Long Distance Telephone Calls made from December 1953 to December 1954 on Crestview 5-4548 and Bradshaw 2-6531.....	$ 326.33
Transportation (2 trips to New York, 1 trip to San Francisco and 2 trips to San Diego, and 1 trip to Chicago).....	913.25
Traveling Expenses: Hotel, Meals, Long Distance Phone Calls, etc.	
In New York—3/31/54-4/18/54	
In Chicago—4/19/54-4/22/54	
In New York—4/26/54-4/30/54	
In San Diego—5/17/54	
In San Diego—5/27/54 and 5/28/54	
In San Francisco—6/8/54.....	1,978.10
Total	$ 3,217.68

Duly Verified. [5]

[Endorsed]: Filed January 21, 1955.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon the petition of Desser, Rau & Hoffman for an Order to Show Cause, it is

Ordered, that George T. Goggin, Esq., Receiver

herein, show cause before the undersigned Referee in Bankruptcy, on the 24th day of February, 1955, at 10 o'clock A.M. in his courtroom, Third Floor Federal Building, Los Angeles, California, if any he has, why an order should not be made and entered herein granting the petition of Desser, Rau & Hoffman for authority to reimburse themselves in the sum of $3217.68 from the "Jack L. Rau Special Account" for transportation, long distance traveling charges, hotels, travel, etc. as per Exhibit "A" Attached to said Petition and made a part hereof by reference; and it is further

Ordered, that service of a copy of this Order to Show Cause and a copy of the Petition upon which it is based may be made by United States mail, postage prepaid, upon said respondent, if said service is made at least five days before the hearing thereon.

Dated: January 21, 1955.

/s/ DAVID B. HEAD
Referee in Bankruptcy. [6]

[Endorsed]: Filed January 21, 1955.

[Title of District Court and Cause.]

MEMORANDUM BY REFEREE, DESSER, RAU & HOFFMAN V. TRUSTEE

The law firm of Desser, Rau and Hoffman have petitioned for leave to reimburse themselves in the amount of $3217.68 from a fund under their con-

trol, held in a bank account known as the "Jack L. Rau, Special Account."

The facts set out in the petition are admitted to be true. I quote from Paragraphs I and III.

"That prior to the filing of the involuntary petition in bankruptcy herein, your petitioners acted as attorneys for Stockholders Publishing Company, Inc., a corporation, the above named alleged bankrupt. That during the period of December 20, 1954 to December 31, 1954, your petitioners acting as attorneys for said alleged bankrupt opened a bank account, designated as 'Jack L. Rau, Special Account' at Union Bank & Trust Co., in which was deposited certain funds [52] belonging to said corporation, and out of which certain disbursements were made. That an accounting of said receipts and disbursements was forwarded to George T. Goggin, Esq., Receiver herein, on January 5, 1955, at which time the said account contained the sum of $16,163.15.

"That your petitioners have remitted to the said Receiver the sum of $12,945.47 and have retained the sum of $3217.68 pending a determination by this Court as to whether or not your petitioners may offset said sums deposited with them by the alleged bankrupt with their out of pocket expenses."

Exhibit "A" shows that these expenditures were for phone calls and travel expense incurred from December 1953 to December 1954.

It is clear that Rau held the moneys in the special account as trustee or agent of the bankrupt

corporation and did not acquire any other interest in the fund. Petitioners have argued that they are entitled to set off their account against the funds in Rau's special account under the provisions of section 68a, Bankruptcy Act, which reads as follows:

"In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

It is clear to me that no mutuality of debts or credits are involved in this matter. Mr. Rau does not hold this fund as his own, but as trustee or agent of the bankrupt. He cannot and does not assert that this fund represents a [53] debt of his to the bankrupt. In fact the fund held by Mr. Rau is the property of the bankrupt.

Before the moneys were turned over to Mr. Rau, his law partner, Mr. Desser, who was a director as well as counsel for the bankrupt corporation, had full knowledge of the insolvency of the bankrupt corporation. At a directors' meeting on December 18, 1954 in which Mr. Desser participated, the directors authorized the president of the bankrupt corporation to institute bankruptcy proceedings. If a transfer of this fund were permitted it would date from December 20, 1954 or later. This would create a voidable preference under the provisions of section 60a of the Bankruptcy Act.

Petition is denied and the petitioners and Jack L. Rau, as an individual, are directed to pay over

to the trustee the amount held in the "Jack L. Rau, Special Account."

If findings and conclusions are not waived, counsel for trustee shall prepare, serve and present the same to the court together with an appropriate order.

Dated this 25th day of July, 1955.

/s/ DAVID B. HEAD
Referee in Bankruptcy. [54]

[Endorsed]: Filed July 25, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The verified petition of Desser, Rau & Hoffman seeking an order of this court allowing payment of expenses having come on for hearing before this court on the 10th day of March, 1955, petitioner being represented by Jack Rau, Esq., and the Trustee being represented by his counsel Robert H. Shutan and Craig, Weller & Laugharn by Robert H. Shutan, and the court having heard statements on behalf of the parties and arguments of counsel, and counsel for both sides having submitted memorandums in support of their respective positions, and the matter having been taken by this court under submission; now upon all of the proceedings had before it and upon all of the statements, plead-

ings and documents this court hereby makes the following Findings of Fact and Conclusions of Law and its Order thereupon:

Findings of Fact

I.

That prior to the filing of the involuntary petition in bankruptcy herein on December 31, 1954, petitioners Desser, [55] Rau & Hoffman, Attorneys at Law, acted as attorneys for Stockholders Publishing Company, Inc., the bankrupt corporation. That Arthur Desser, one of the partners in said law firm of Desser, Rau & Hoffman, was an officer and director of the bankrupt corporation, as well as counsel, during the entire month of December 1954, as well as for a number of months prior thereto.

II.

That at a meeting of the Board of Directors of the bankrupt corporation on December 18, 1954, at which meeting Arthur Desser was present and participated, the directors authorized the President of the bankrupt corporation to institute bankruptcy proceedings.

III.

That after ceasing its operation on December 18, 1954, the bankrupt corporation needed access to a new bank account for the protection of its incoming funds and for the making of certain essential disbursements from said funds. That for said purpose, on December 20, 1954, the petitioners Desser, Rau & Hoffman, acting as attorneys for the bank-

rupt corporation, opened at the Union Bank & Trust Company of Los Angeles, a bank account designated as "Jack L. Rau, Special Account". That in said account there was deposited certain funds belonging to the corporation, and out of said account certain disbursements were made.

IV.

That on January 5, 1955, petitioners herein rendered an accounting of said receipts and disbursements to George T. Goggin, the Receiver, at which time the said account contained the sum of $16,163.15. That petitioners remitted to the Receiver the sum of $12,945.47 and have retained and still hold the sum of $3,217.68.

V.

That petitioners expended from their own [56] funds on behalf of the bankrupt corporation between December 1953 and December 1954, the sum of $3,217.68 for long distance phone calls and travel expense on behalf of the bankrupt corporation. That all of said expenditures and expenses were incurred prior to December 18, 1954.

VI.

That on December 31, 1954, the date of the commencement of these bankruptcy proceedings, on January 5, 1955, and at all times pertinent hereto, the subject sum of $3,217.68 has remained in said "Jack L. Rau, Special Account" at the Union Bank & Trust Company, Los Angeles.

VII.

That Jack L. Rau held the monies in said special account as Trustee or agent of the bankrupt corporation and said Jack L. Rau did not acquire any other interest in said fund.

VIII.

That the monies held by Jack L. Rau in the "Jack L. Rau, Special Account" at the Union Bank & Trust Company of Los Angeles constitutes property of the bankrupt corporation.

From the above Findings of Fact this court now makes the following:

Conclusions of Law

I.

Jack L. Rau held the subject monies in said special account as Trustee or agent of the bankrupt corporation and did not acquire any other interest in said fund.

II.

There is no mutuality of debts or credits between the funds held by petitioners and the obligation of the bankrupt corporation for the funds advanced by petitioners. The funds held [57] by Jack L. Rau on a special account constitute property of the bankrupt corporation.

Upon the foregoing Finding of Fact and Conclusions of Law this court now makes its Order.

Order

Upon all of the proceedings had before me in this matter and upon the foregoing Findings of Fact and Conclusions of Law, it is hereby

Ordered that Desser, Rau & Hoffman and Jack L. Rau individually pay over to George T. Goggin, Trustee herein, the sum of $3,217.68, being the amount held in the "Jack L. Rau, Special Account."

Dated: August 17, 1955.

/s/ DAVID B. HEAD
Referee in Bankruptcy. [58]

Affidavit of Service by Mail Attached. [59]

[Endorsed]: Filed August 17, 1955.

[Title of District Court and Cause.]

PETITION FOR REVIEW

To the Honorable David B. Head, Referee in Bankruptcy:

Come now your petitioners, Desser, Rau & Hoffman, and petition for a review of the order made and entered on August 17, 1955, and titled "Findings of Fact, Conclusions of Law and Order", and respectfully shows:

I.

Petitioners are, or were at the time of the events in controversy, partners in the law firm of Desser,

Rau & Hoffman with offices at 444 North Camden Drive, Beverly Hills, California.

II.

On January 21, 1955, petitioners filed herein their petition entitled "Petition to Allow Payment of Expenses", in which petitioners prayed that an order be entered authorizing them to reimburse themselves from an account known as the "Jack L. Rau Special Account" which had been created by petitioners in which certain funds of the corporation were deposited and out of which [60] certain disbursements were made. In said petition it was alleged that in connection with petitioners' representation of the bankrupt as its counsel prior to bankruptcy, and since December 26, 1953, petitioners expended the sum of $3,217.68 for which petitioners were not reimbursed, and which amount said corporation owed petitioners at the time of the filing of the petition in bankruptcy. It was further alleged in said petition that an accounting of deposits in and disbursements from said special account was made to the Receiver herein on January 5, 1955, at which time said account contained the sum of $16,163.15 and that petitioners remitted to said Receiver the sum of $12,945.47 and retained the sum of $3,217.68, the amount of their out of pocket expense, pending a determination as to whether or not they might offset said sum so retained against said out of pocket expense: all of which will more fully appear from the Petition to Allow the Payment of Expenses.

III.

Said petition came on for hearing before Referee David B. Head on the 10th day of March, 1955, at which time unsworn statements were made on behalf of the parties and said Referee heard the arguments of counsel for the respective parties. Counsel for petitioners and counsel for the Trustee in bankruptcy herein submitted memoranda in support of their respective positions and the matter was thus taken by the Court under such submission. No answer of the Receiver or Trustee in bankruptcy herein was filed and there was no sworn testimony or evidence on behalf of either side.

IV.

On July 25, 1955, said Referee filed his memorandum in which he concluded that petitioners' petition should be denied and directed that, if findings and conclusions were not waived, counsel for the Trustee should prepare, serve and present the same to the [61] Court together with an appropriate order. Thereafter on August 17, 1955, said Referee filed his findings of fact, conclusions of law and order denying the prayer of your petitioners' petition.

V.

Petitioners respectfully contend that the Referee erred in the following respects:

1. In denying the prayer of petitioners' petition.

2. In making findings of fact numbered VII and VIII on the basis of which the prayer of the petition was denied. Said findings VII and VIII do

not constitute ground or reason for the conclusion of law that petitioners possess no right of setoff or counterclaim as prayed in their petition.

3. In concluding as a matter of law that because said special account was created by petitioners and was held by Jack L. Rau as trustee or agent of the bankrupt, and did not acquire any other interest in said fund, petitioners counter-demand for an admitted indebtedness of the bankrupt to them is not allowable.

4. In concluding as a matter of law that there is no mutuality of debts or credits between the fund held by petitioners and the obligation of the bankrupt on its indebtedness to petitioners.

5. In holding that petitioners right of setoff or counter-claim is not allowable under Section 68 of the Bankruptcy Act.

6. In failing to hold that under Rule 13 (b) of the Federal Rules of Civil Procedure (which provides that "a pleading may state as a counter-claim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim"), petitioners' counter demand is assertable in bankruptcy, (General Order No. 37, as amended, providing that in proceedings under the Bank- [62] ruptcy Act the Federal Rules of Civil Procedure shall be followed when not inconsistent with the Act or other general orders), and in failing to hold that the application of Rule 13 (b) is not inconsistent with any provisions of the Bankruptcy Act or with any other general order in bankruptcy.

7. In holding that there is no mutuality of debts or credits between the funds held by petitioners and the obligation of the bankrupt corporation for funds advanced by petitioners.

8. In holding that because the said special account constituted property of the bankrupt corporation, petitioners right of setoff or counterclaim cannot lawfully be maintained.

9. In failing to hold that "mutual credit" is not confined to ordinary pecuniary demands but extends to all cases where the creditor has in his hands goods, money or choses in action belonging to the debtor which cannot be "got at" without suit at law or complaint in equity.

10. In failing to hold that the right of setoff or counterclaim in bankruptcy does not depend upon the variety or nature of the contract debt or the character of or position occupied by the parties.

11. In holding (in his memorandum dated July 25, 1955) that if a transfer to petitioners of the amount of their out of pocket expense, out of said fund were permitted, it would date from December 20, 1954 or later and would thus create a voidable preference.

12. In failing to hold that both before and after bankruptcy, the amount of the debt due petitioners could be setoff or counterclaimed against the amount due from petitioners to the bankrupt out of said special account, and that the taking or authorization to setoff or counterclaim as against said account of the amount so due to petitioners would not constitute an avoidable preference re-

gardless of when the setoff occurred or when [63] bankruptcy intervened.

13. In failing to hold that no question of avoidable preference is present in the instant proceedings.

Wherefore petitioners, feeling aggrieved because of the Order, Findings of Fact and Conclusions of Law of said Referee, pray that the same may be reviewed as provided by Section 39c of the Bankruptcy Act as amended; that said Order be reversed and remanded with directions to allow the prayer of petitioners' petition or reversed with an order by the Court, on review, allowing said prayer of said petition.

That the Honorable David B. Head, Referee in Bankruptcy, prepare his certificate of review and attach thereto the following:

1. The order of adjudication.
2. Petition of petitioners to allow payment of expenses.
3. Order to show cause of said Referee in said bankruptcy upon George T. Goggin, Esq., the Receiver herein, dated January 21, 1955.
4. The transcript, if any, of the reporter on the hearing on petitioners' petition on March 10, 1955.
5. Petitioners' brief in support of their petition.
6. Trustee's memorandum in opposition to petition to allow payment of expenses.
7. Reply of petitioners to Trustee's memorandum.
8. Memorandum by Referee dated July 25, 1955.

9. Findings of fact, conclusions of law and order of said Referee dated August 17, 1955.

10. Petition for review.

Respectfully submitted,

DESSER, RAU & HOFFMAN
/s/ By DAVID M. HOFFMAN
Petitioners. [64]

Duly Verified.

Affidavit of Service by Mail Attached. [65]

[Endorsed]: Filed August 26, 1955.

In the United States District Court, Southern District of California, Central Division

In Bankruptcy—No. 64381-WB

In the Matter of STOCKHOLDERS PUBLISHING COMPANY, INC., Bankrupt.

ORDER AFFIRMING ORDER OF REFEREE

The above entitled matter having come on regularly for hearing before the above entitled court on the 28th day of November, 1955, at 9:45 o'clock A.M., upon the Petition of Desser, Rau & Hoffman, for review of the Referee's Order of August 17, 1955, directing that Desser, Rau & Hoffman and Jack L. Rau pay over to George T. Goggin, Trustee, the sum of Three Thousand Two Hundred Seventeen and sixty-eight cents ($3217.68); and Desser and Hoffman by David Nisall appearing for

and on behalf of said Desser, Rau & Hoffman, Petitioners, and Robert H. Shutan and Craig, Weller & Laugharn by Robert H. Shutan appearing for and on behalf of said George T. Goggin, Trustee, and by agreement of all parties the matter having been submitted to the court upon the written briefs and points and authorities, and the court having duly considered the same, now it is hereby

Ordered that the Order of the Referee dated August 17, 1955, ordering that Desser, Rau & Hoffman and Jack L. Rau individually pay over to George T. Goggin, Trustee, the sum of $3217.68 be and [111] it hereby is approved and affirmed. It is further

Ordered that the Findings of Fact and Conclusions of Law of the Referee in said matter, also under date of August 17, 1955, are hereby approved and adopted as part of this Order.

Dated: January 11, 1956.

/s/ W. M. BYRNE
Judge of the U. S. District Court.

Approved as to form pursuant to Rule 7 (a), as amended.

DESSER & HOFFMAN and DAVID NISALL

/s/ By DAVID R. NISALL
Attorneys for Petitioners. [112]

[Endorsed]: Docketed, Entered and Filed January 11, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Desser, Rau & Hoffman, petitioners above named, and Jack L. Rau, individually, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the order of the District Court of the United States, Southern District of California, Central Division, entered on January 11, 1956, affirming the order of Referee in Bankruptcy David B. Head, dated August 17, 1955, ordering that Desser, Rau & Hoffman and Jack L. Rau, individually, pay over to George T. Goggin, Trustee in bankruptcy of Stockholders Publishing Company, Inc., a corporation, in the sum of $3,217.68, and approving and adopting as part of said order on review the Findings of Fact and Conclusions of Law of said Referee in said matter, also dated August 17, 1955.

Dated January 31, 1956.

DESSER, RAU & HOFFMAN

/s/ By DAVID R. NISALL

Attorneys for Desser, Rau & Hoffman and Jack L. Rau individually. [113]

Receipt of Copy Attached.

[Endorsed]: Filed January 31, 1956.

[Title of District Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

Know all men by these presents, that Fidelity and Deposit Company of Maryland, a corporation, organized and existing under the laws of the State of Maryland, and duly licensed to transact business in the State of California, is held and firmly bound unto George P. Goggin, Trustee, in the above case, in the penal sum of Two Hundred Fifty and no/100 ($250.00), to be paid to said George P. Goggin, Trustee, his successors, assigns or legal representatives, for which payment well and truly to be made, the Fidelity and Deposit Company of Maryland binds itself, its successors and assigns firmly by these presents.

The condition of the above obligation is such, That Whereas the firm of Desser, Rau, and Hoffman, and Jack L. Rau, individually, have appealed or are about to appeal to the United States Court of Appeals for the Ninth Court from an Order heretofore entered in this proceeding on January 11, 1956, which Order affirmed an Order by Referee Head, dated August 17, 1955, requiring Desser, Rau, and Hoffman, and Jack L. Rau, individually, to pay over to George P. Goggin, Trustee, the sum of Three Thousand Two Hundred and Seventeen and 68/100 ($3,217.68) and which approved and adopted the findings of fact and conclusions of law of said Referee Head.

Now, Therefore, if the above named appellant

shall prosecute said appeal to effect and answer all costs which may be adjudged against them if the appeal is dismissed, or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, then this obligation shall be void; otherwise to remain in full force and effect.

It is Hereby agreed by the Surety that in case of default or contumacy on the part of the Principal or Surety, the Court may, upon notice to them of not less than ten days, proceed summarily and render judgment against them [114] or either of them, in accordance with their obligation and award execution thereon.

Signed, Sealed and Dated this 30 day of January, 1956.

[Seal] FIDELITY AND DEPOSIT COMPANY OF MARYLAND

/s/ By ROBERT HECHT
Attorney-in-fact.

Approved this 31st day of January, 1956.

JOHN A. CHILDRESS
Clerk, U. S. District Court, Southern District of California.

/s/ By REX LAWSON

Notary Public's Certificate Attached. [115]

[Endorsed]: Filed January 31, 1956.

[Title of District Court and Cause.]

AFFIDAVIT

State of California,
County of Los Angeles—ss.

David R. Nisall, being first duly sworn, deposes and says:

That he has supervision of the appeal in the above entitled cause and together with another associate in his office had prepared a statement of the case, for purposes of the appeal, pursuant to Rule 76 of the Rules of Civil Procedure, but thereafter it was determined by counsel for petitioners-appellants and counsel for the Trustee in bankruptcy, respondent-appellee, that instead of presenting an agreed statement and instead of serving designations of the record, that the parties by written stipulation designate the parts of the record to be included in the record on appeal; that affiant has been practically constantly engaged in set matters and will be so engaged for some days to come; affiant further states that it is necessary [116] that an additional ten (10) days be granted within which to do such work as is necessary to docket the record on appeal. Affiant further respectfully requests the Court to grant an extension of ten (10) days to and including March 22, 1956.

/s/ DAVID R. NISALL
Affiant

Subscribed and sworn to before me this 8th day of March, 1956.

[Seal] /s/ PATRICIA BRADY
Notary Public in and for said County and State. [117]

[Endorsed]: Filed March 9, 1956.

[Title of District Court and Cause.]

ORDER

It is Hereby ordered that the time to docket the record in the above entitled case on appeal to the United States Court of Appeals for the Ninth Circuit be and the same is hereby extended ten (10) days, to and including March 22, 1956.

Dated: March 9, 1956.

/s/ W. M. BYRNE
Judge

There is no objection to the entry of the foregoing order. Robert H. Shutan and Craig, Weller & Laugharn. By Robert H. Shutan, Attorneys for respondent-appellee. [118]

[Endorsed]: Filed March 9, 1956.

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED ON BY APPELLANTS

1. The District Court erred in holding that appellants' claim for actual and admitted out-of-pocket expenses incurred on behalf of the bankrupt, prior to bankruptcy, is not the proper subject of a setoff or counterclaim against the claim of the bankrupt and its Trustee to the fund held by appellants in the "Jack L. Rau, Special Account".

2. The District Court erred in concluding as a matter of law that because the special account was created by petitioners and was held by Jack L. Rau as Trustee or agent of the bankrupt, and did not themselves own or acquire any other interest in said fund, appellants' counterdemand for an admitted indebtedness of the bankrupt to them is not allowable.

3. The District Court erred in holding that Jack L. Rau, the partner designated by appellants to hold the subject moneys in a special account as Trustee or agent of the bankrupt, did not acquire any other interest in said fund and that [119] therefore there is no mutuality of debts or credits as between the respective claims.

4. The District Court erred in holding that petitioners' right of setoff or counterclaim is not allowable under Section 68 (a) of the Bankruptcy Act.

5. Section 68 (a) of the Bankruptcy Act re-

quires that the prayer of the petition for an order allowing petitioners to setoff or counterclaim their undisputed demand against the bankrupt be granted since the Courts have given a broad construction to the words "mutual debts or mutual credits", not confining them to the ordinary "debtor and creditor" situation but extending their meaning to include money, property and even choses in action of the bankrupt held by the creditor.

6. The District Court erred in failing to hold that under Rule 13(b) of the Federal Rules of Civil Procedure (said rules being made applicable to bankruptcy by General Order in Bankruptcy No. 37 as amended) a pleading may state as a counterclaim any claim against an opposing party even though not arising out of the transaction or occurrence which is the subject matter of the opposing parties' claim, and in failing to hold that under said rule appellants' setoff or counterclaim for out-of-pocket expenses is assertable.

7. The District Court erred in failing to hold that a Bankruptcy Court is a court of equity applying equitable principles in the accomplishment of substantial justice and that under such principles appellants' setoff or counterclaim should be allowed.

Dated: March 8, 1956.

DESSER, RAU & HOFFMAN

/s/ By DAVID R. NISALL

Attorneys for petitioners - appellants. [120]

[Endorsed]: Filed March 9, 1956.

[Title of District Court and Cause.]

STIPULATION AS TO RECORD

It is Hereby stipulated and agreed by and between Desser, Rau & Hoffman (petitioners-appellants) and George T. Goggin, Esq., Trustee in bankruptcy of Stockholders Publishing Company, Inc., a bankrupt, (respondent-appellee) by their respective counsel that the following are designated as parts of the record and proceedings before the United States District Court for the Southern District of California, Central Division, to be included in the record on appeal to the United States Court of Appeals for the Ninth Circuit:

1. Petition of Desser, Rau & Hoffman to allow payment of expenses, filed January 21, 1955, together with Exhibit A to the petition, filed before Referee David B. Head.

2. Order of Referee David B. Head upon George T. Goggin as Receiver of the bankrupt to show cause why an order should not be entered pursuant to the prayer of said [121] petition dated and filed January 21, 1955.

3. Brief in support of petition to allow payment of expenses filed with said referee.

4. Trustee's memorandum in opposition to petition to allow payment of expenses, filed with said referee.

5. Reply to Trustee's memorandum in re petition to allow payment of expenses.

6. Memorandum of Referee David B. Head, filed

July 25, 1955, denying the petition to allow payment of expenses and ordering petitioners and Jack L. Rau, individually, to pay over to the Trustee in bankruptcy the amount held in the "Jack L. Rau, Special Account".

7. Findings of fact, conclusions of law and order of Referee David B. Head, entered and filed on August 17, 1955, ordering Desser, Rau & Hoffman and Jack L. Rau, individually, to pay over to George T. Goggin, Trustee, the sum of $3,217.68, being the amount held in the "Jack L. Rau, Special Account".

8. Petition for review of the order, findings and conclusions of Referee David B. Head by the United States District Court, filed August 26, 1955.

9. Points, authorities and brief on behalf of petitioners on petition for review by the United States District Court.

10. Trustee's memorandum of points and authorities in opposition to petition for review.

11. Reply of petitioners to Trustee's memorandum in opposition to petition for review.

12. Order of the United States District Court (Honorable Wm. M. Byrne) affirming the order of Referee David B. Head, dated August 17, 1955, and approving and adopting the findings of fact and conclusions of law [122] of said Referee.

13. Notice of appeal by petitioners-appellants, dated, served and filed January 31, 1956.

14. Bond or undertaking for costs on appeal in the sum of $250.00, executed by Fidelity and Deposit Company of Maryland.

Pursuant to the foregoing stipulation, the parties hereto respectfully request that the Clerk of the District Court of the United States for the Southern District of California, Central Division, under his hand and seal of the Court transmit to the Clerk of the United States Court of Appeals for the Ninth Circuit the matters so designated by the parties by such stipulation.

Dated: March 8, 1956.

DESSER, RAU & HOFFMAN
/s/ By DAVID R. NISALL
Attorneys for petitioners-appellants

ROBERT H. SHUTAN and CRAIG, WELLER & LAUGHARN
/s/ By ROBERT H. SHUTAN
Attorneys for respondent-appellee

[Endorsed]: Filed March 9, 1956.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 123, inclusive, contain the original

Petition to Allow Payment of Expenses;

Order to Show Cause;

Trustee's Memorandum in Opposition to Petition to Allow Payment of Expenses;

Reply to Trustee's Memorandum in re Petition to Allow Payment of Expenses;

Brief in Support of Petition to Allow Payment of Expenses;

Memorandum by Referee;

Findings of Fact, Conclusions of Law & Order;

Petition for Review;

Petition for Review of Desser, Rau & Hoffman of Order of David B. Head, Referee;

Trustee's Memorandum of Points & Authorities in Opposition to Petition for Review;

Reply of Petitioners to Trustee's Memorandum in Opposition to Petition for Review;

Order Affirming Order of Referee;

Notice of Appeal;

Undertaking for Costs on Appeal;

Affidavit of David R. Nisall Stating that he has supervision of the appeal;

Order extending time to docket record on appeal;

Statement of Points to Be Relied on by Appellants;

Stipulation as to Record;

Which, in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in said cause.

I further certify that my fees for preparing the foregoing record amount to $2.00, which sum has been paid by appellants.

Witness my hand and the seal of said District Court, this 19th day of March, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk

/s/ By CHARLES E. JONES,
Deputy

[Endorsed]: No. 15073. United States Court of Appeals for the Ninth Circuit. Desser, Rau & Hoffman, and Jack L. Rau, individually, Appellants, vs. George T. Goggin, Trustee in Bankruptcy of Stockholders Publishing Company, Inc., a bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed March 20, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15073

DESSER, RAU & HOFFMAN, Appellants,

vs.

GEORGE T. GOGGIN, TRUSTEE,

Appellee.

ADOPTION OF APPELLANTS' STATEMENT OF POINTS AND DESIGNATION

Now come Desser, Rau & Hoffman, appellants in the above entitled cause by Desser & Hoffman, their attorneys, and hereby adopt the statement of points to be relied upon by appellants on appeal as contained in the typewritten transcript of record certified by the Clerk of the District Court of the United States for the Southern District of California, Central Division, and filed herein; and also hereby adopt the designation of the record as per stipulation of the parties, also filed herein as part of said typewritten transcript of the record, except that appellants are advised and informed by the Clerk of the United States Court of Appeals for the Ninth Circuit that briefs of the parties filed below are not printed by him although the Court may, if it wills, refer to them by consulting said typewritten transcript. Therefore, the following items appearing at their respective index pages in said typewritten transcript so certified and filed by said Clerk of the

United States District Court are not designated for printing:

Brief in Support of Petition to Allow Payment of Expenses—Typewritten Transcript—Page 29

Trustee's Memorandum in Opposition to Petition to Allow Payment of Expenses—Typewritten Transcript—Page 7

Reply to Trustee's Memorandum in re Petition to Allow Payment of Expenses—Typewritten Transcript—Page 12

Points and Authorities and Brief on Behalf of Petitioners—Typewritten Transcript—Page 66

Trustee's Memorandum of Points and Authorities in Opposition to Petition for Review—Typewritten Transcript—Page 98

Reply of Petitioner to Trustee's Memorandum in Opposition to Petition for Review — Typewritten Transcript—Page 103

Dated: March 28, 1956.

DESSER & HOFFMAN
/s/ By DAVID R. NISALL,
Attorneys for Appellants

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 30, 1956. Paul P. O'Brien, Clerk.